76-6211

NO. _____

Supreme Court, U. S.
FILED
NOV 2 1976
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

KEITH NOWICKI d/b/a
K & F FOOD MARKET

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Robert J. DuComb, Jr.
of
DU COMB, NIMTZ & DU COMB
511 West Colfax Avenue
South Bend, Indiana 46601
Telephone: (219) 233-3147

Attorney for Petitioner,
Keith Nowicki d/b/a
K & F Food Market

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

KEITH NOWICKI d/b/a
K & F FOOD MARKET

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Robert J. DuComb, Jr.
of
DU COMB, NIMTZ & DU COMB
511 West Colfax Avenue
South Bend, Indiana 46601
Telephone: (219) 233-3147

Attorney for Petitioner,
Keith Nowicki d/b/a
K & F Food Market

TABLE OF CONTENTS

		Page
TABLE OF CASES		ii
I.	PETITION FOR CERTIORARI	1
II.	OPINIONS BELOW.	1
III.	JURISDICTION.	2
IV.	QUESTION PRESENTED.	2
V.	CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
VI.	STATEMENT OF THE CASE	3
	A. ADMINISTRATIVE PROCEEDINGS.	3
	B. PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION.	5
	C. PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT	6
VII.	REASONS FOR GRANTING THE WRIT.	7
VIII.	CONCLUSION.	19

TABLE OF CASES

	Page
American Fruit Growers, Inc. v. S. T. Runzo & Company, Inc., 95 F. Supp. 842 (W.D. Penn. 1951)	13
Butz v. Glover Livestock Commission Company, Inc., 411 U.S. 182, 36 L.Ed. 2d 142, 93 S.Ct. 1455 (1973).	9, 14, 15, 16, 18
Cross v. United States, 512 F.2d 1212 (4th Cir. 1975).	10, 11, 12, 14, 17
Goodman v. United States, 518 F.2d 505 (5th Cir. 1975)	10, 12, 13, 18
J.C.B. Super Markets, Inc. v. United States, 57 F.R.D. 500 (W.D. N.Y. 1972).	8
Martin v. United States, 459 F.2d 300 (6th Cir. 1972)	8, 11, 13
Spano v. Western Fruit Growers, 83 F.2d 150 (10th Cir. 1936)	13
Welch v. United States, 464 F.2d 682 (4th Cir. 1972)	14

TABLE OF CASES (cont.)

	Page
STATUTES AND REGULATION	
7 U.S.C.A., § 2020	3,
7 U.S.C.A., § 2022	3, 5
28 U.S.C.A. § 1254(1).	2
Rule 19(1)(b) of the Rules of the Supreme Court of the United States . . .	7
Code of Federal Regulations	
7 C.F.R. 272-274	3
35 F.R. 19737.	3

I. PETITION FOR CERTIORARI

The petitioner, Keith Nowicki d/b/a K & F Food Market, hereinafter referred to merely as "Nowicki," respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgment of the court which reversed the judgment in the United States District Court for the Northern District of Indiana which judgment had reduced Nowicki's administratively imposed period of disqualification from participation in the Food Stamp Program to 120 days.

II. OPINIONS BELOW

On March 24, 1971, the Director, Food Stamp Division, Food and Nutrition Service, U. S. Department of Agriculture determined that Nowicki would be disqualified from participation in the Food Stamp Program for a period of one year. Appendix A, p. 1. The Food Stamp Review Officer, Food and

Nutrition Service sustained the period of disqualification on April 27, 1971. Appendix A, p. 4. There were two Memorandums, or opinions in the District Court. These were not formally reported but are set forth in Appendix B, p. 8. The opinion of the Court of Appeals was rendered on June 22, 1976, and is reproduced in Appendix C, p. 18 to this petition, and is reported at 536 F.2d 1171 (7th Cir. 1976).

III. JURISDICTION

The judgment of the Court of Appeals was entered on June 22, 1976. Appendix C, p. 18. A timely Petition for Rehearing was filed and was denied on August 5, 1976. Appendix D, p. 31. The jurisdiction of this court is invoked under the provisions of 28 U.S.C.A. § 1254(1).

IV. QUESTION PRESENTED

Whether under the Judicial Review section of the Food Stamp Act a United States

District Court may reduce an administratively imposed sanction for violations of the Food Stamp Act when the sanction imposed by the Department of Agriculture is within the allowable range of remedies provided by the Food Stamp Act and the implementing regulations.

V. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves parts of § 11 and § 13 of the Food Stamp Act, 78 Stat. 707 (1964) 7 U.S. Code Annot. § 2020 and § 2022; and portions of 7 C.F.R. 272-274, 35 F.R. 19737. These are reprinted in pertinent part only in Appendix E, p. 34.

VI. STATEMENT OF THE CASE

A. ADMINISTRATIVE PROCEEDINGS

On January 13, 1971, Nowicki was informed by a letter from the Chicago office of the Food and Nutrition Service that certain employees of his store had violated the Food Stamp Act and the regulations adopted pur-

suant thereto on five occasions in early November of 1970. The violations consisted of exchanging non-food items such as cigarettes, beer, clothing, jewelery and paper products for food stamps. The violations were uncovered as a result of exchanges made by employees of the Department of Agriculture who posed as normal customers. Nowicki was subsequently advised on March 24, 1971 by the Director of the Food Stamp Division, Food and Nutrition Service, United States Department of Agriculture, that he would be disqualified from participation in the Food Stamp Program for a period of one year. Appendix A, p. 1. Nowicki sought the appropriate administrative review of that determination. However, on April 27, 1971, Marshall F. Spear, the Food Stamp Review Officer for the Food and Nutrition Service of the United States Department of Agriculture sustained the previously imposed period of disqualification. Appendix A, p. 4. The period of disqualification began on May 14, 1971.

B. PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION

On May 27, 1971, Nowicki filed his civil action in the United States District Court for the Northern District of Indiana, South Bend Division, pursuant to the provisions of § 13 of the Food Stamp Act, 7 U.S.C.A. § 2022, for a judicial review of the above described administrative action. During the pendency of the civil action in the District Court, the District Court stayed plaintiff's disqualification period and enjoined the United States of America, hereinafter referred to merely as "the Government," from disqualifying Nowicki from participating in the Food Stamp Program. On November 22, 1974, the District Court granted a judgment to the Government and dismissed the injunction. Appendix B, p. 8. On February 24, 1975, the District Court sua sponte entered an order reopening the judgment of November 22,

1974. After further proceedings, including a hearing, the District Court then ordered on March 26, 1975 that Nowicki's period of disqualification be reduced from the previously imposed period of one year to a period of only 120 days. The District Court then entered judgment based on that order. Appendix B, p. 16.

C. PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND IN THE SUPREME COURT OF THE UNITED STATES

The Government appealed the judgment of the District Court which reduced the period of disqualification. On June 22, 1976 the United States Court of Appeals for the Seventh Circuit reversed the judgment of the District Court of March 26, 1975. Appendix C, p. 18. A timely Petition for Rehearing was denied on August 5, 1976. Appendix D, p. 33. On September 17, 1976, Mr. Justice Stevens ordered in No. A-226, and in response to Nowicki's application, that the

execution and enforcement of the judgment of the United States Court of Appeals for the Seventh Circuit be stayed pending the filing and disposition of this Petition for a Writ of Certiorari.

VII. REASONS FOR GRANTING THE WRIT

The issue to be presented to the Supreme Court on certiorari is an issue of first impression for the Court, and is the proper interpretation of the scope of judicial review of administrative decisions under the Food Stamp Act. The Supreme Court should grant the writ since under Rule 19(1)(b) of the Rules of the Supreme Court of the United States there is a conflict between the decision rendered in the instant case and the decisions of other United States Courts of Appeal in identical cases. Basically the United States Courts of Appeal have adopted two differing interpretations of this section of the Food Stamp Act. The existence of

these divergent views was noted recently by the United States Court of Appeals for the Second Circuit. J.C.B. Super Markets, Inc. v. United States 530 F.2d 1129 (2nd Cir. 1976). There the Court of Appeals stated as follows:

> "Whether the district court had jurisdiction in the first place to review the agency penalty is a question which has not been decided in this court and which has created divergent views in other circuits. We need not address it here since Judge Curtin adopted the more liberal standard which permits such review and found that U.S.D.A. had not abused its discretion ." (Emphasis added) J.C.B. Super Markets, Inc. v. United States, supra at 1123.

The Supreme Court has never resolved these divergent interpretations, but it should.

The first interpretation has been adopted by the Sixth Circuit in Martin v. United States 459 F.2d 300 (6th Cir. 1972) and by the Seventh Circuit in the instant case. Basically those decisions have held that the District Court could only determine whether evidence existed to substantiate the administrative finding of the Department of Agriculture that the merchant had violated the provisions of the Food Stamp Act and the regulations adopted pursuant thereto. A necessary part of this interpretation is that a District Court may not reduce administratively imposed sanctions if those sanctions are "... an allowable judgment in [its] choice of remedy." Butz v. Glover Livestock Commission Company, Inc. 411 U.S. 182, 36 L.Ed.2d 142, 93 S.Ct. 1455 (1973). Thus, the decisions adopting this interpretation hold that the period of disqualification cannot be reduced by a District Court if there is evidence to substantiate the administrative determination that a violation of the Food Stamp Act occurred and if the period of disqualification is within the legal authority of the Department of Agriculture.

However, that interpretation of the scope of judicial review under the Food Stamp Act is specifically disapproved by the United

States Court of Appeals for the Fourth Circuit and by the United States Court of Appeals for the Fifth Circuit. Cross v. United States 512 F.2d 1212 (4th Cir. 1975). Goodman v. United States 518 F.2d 505 (5th Cir. 1975). In Goodman v. United States the Fifth Circuit Court of Appeals held

> "... the judicial review provision of the Food Stamp Act does not limit the court's review to the finding of a violation of the Act by retail store, but also permits the court to review the sanction imposed on the store by the Department of Agriculture. This decision is in accord with the Fourth Circuit, and contrary to the Sixth Circuit, the only other circuits which have directly addressed the question." Goodman v. United States, supra, at 506.

In the instant case, the Seventh Circuit has clearly aligned itself with the Sixth Circuit.

In Cross v. United States, supra, the Fourth Circuit held

> "... that the scope of judicial review extends to the period of administrative sanction, notwithstanding that the Secretary did not impose a penalty exceeding that

> permitted by the statute or the regulations." Cross v. United States, supra, at 1215.

Thus, those opinions, together with the dissenting opinion of Judge Edwards in Martin v. United States 459 F.2d 300, 302-303 (6th Cir. 1972) adopt the interpretation of the Food Stamp Act sought by Nowicki here.

A close examination of those cases which have interpreted the scope of judicial review under the Food Stamp Act clearly indicates that the interpretation sought here by Nowicki is the proper one. The broad scope of judicial review sought here is supported first of all by the plain meaning of the judicial review section of the Food Stamp Act cited above. The term "administrative action" used in the statute is not merely a determination as to whether the Food Stamp Act has been violated. Rather that term encompasses two separate concepts. The first concept is that the Department of Agriculture makes a determination as to whether the Food Stamp

Act has been violated. Then, if it appears that the Act has been violated, the Department takes the second part of the administrative action "by imposing a sanction or penalty." Goodman v. United States, supra, at 509. Cross v. United States, supra, at 1219. This definition of administrative action is particularly appropriate here since the administrative action against Nowicki was not complete until the Department of Agriculture had imposed its sanction upon him. If the administrative action is only the finding that the Food Stamp Act was violated, there would be no aggrieved merchants since the only reason to complain about the administrative action is to dispute the imposition of a penalty.

The plain meaning of the term "trial de novo" also clearly supports the interpretation sought by Nowicki here. Generally the term "trial de novo" means that the entire matter will be heard again in its entirety,

including the hearing of all evidence, as though no previous action had been taken. This term has been defined in many cases and must surely have been in the mind of Congress when it was used in this statute. American Fruit Growers, Inc. v. S. T. Runzo & Company, Inc. 95 F.Supp. 842,844 (W.D.Penn. 1951). Spano v. Western Fruit Growers 82 F.2d 150, 152 (10th Cir. 1936). Goodman v. United States, supra, at 509. Martin v. United States, supra, at 302. If Congress had desired to limit the scope of judicial review, it could have refrained from using the established term of "trial de novo." Also, Congress could have specifically limited the trial de novo by using unambiguous limiting language. Since this was not done, a fair inference is that "trial de novo" should have its plain and ordinary meaning.

The interpretation of the Food Stamp Act sought here by Nowicki is also supported by the legislative history of the statute.

Welch v. United States, supra, at 686. This interpretation is also supported by the conclusion of the Court of Appeals for the Fourth Circuit that procedural due process is not properly provided during the administrative review portion of the Food Stamp Act. Cross v. United States, supra, at 1216-1217.

Perhaps one of the most compelling reasons for adopting the broad interpretation of the Food Stamp Act sought here by Nowicki is that adopting the narrow view will make unfair and arbitrary administrative decisions more unreviewable. It appears that the Supreme Court is seriously concerned that administrative decision making is becoming increasingly unreviewable and that administrative agencies may become more arbitrary and capricious. These two concerns were mentioned in Butz v. Glover Livestock Commission Company, Inc., supra, in the dissent of Mr. Justice Stewart and Mr. Justice Douglas. There they stated as follows:

> "The reversal today of a wholly defensible Court of Appeals judgment accomplishes two unfortunate results. First, the court moves administrative decision making one step closer to unreviewability, an odd result at a time when serious concern is being expressed about the fairness of agency justice. Second, the court serves notice upon the Federal judiciary to be wary, indeed, of venturing to correct administrative arbitrariness." (Emphasis added) Butz v. Glover Livestock Commission Company, Inc., supra, 411 U.S. at 191, 36 L.Ed. at 150.

If the Supreme Court permits the narrow interpretation of the Food Stamp Act to stand, this Court will, in effect, make administrative decision making more difficult to review and place additional burdens in the path of alleviating administrative arbitrariness and unfairness.

Perhaps it should be noted here that the Supreme Court will not have to overrule its previous decision in Butz v. Glover Livestock Commission Company, Inc., supra. Rather the Butz decision is distinguishable from the instant case. This is true even

though the Court of Appeals for the Seventh Circuit relied so heavily on Butz v. Glover Livestock Commission Company, Inc., supra, in its opinion. There the Court of Appeals adopted the analogy argued by the Government that the scope of review under other statutes such as the Commodity Exchange Act and the Perishable Agricultural Commodities Act is identical to the scope of review provided by the Food Stamp Act. The standard for judicial review under both the Commodity Exchange Act and the Perishable Agricultural Commodities Act is described in detail in Butz v. Glover Livestock Commission Company, Inc., supra. There the court held that a Court of Appeals may only decide whether the Secretary of Agriculture made an allowable judgment in the range of his choice of remedies. Butz v. Glover Livestock Commission Company, Inc., supra, 411 U.S. at 189. However, the analogy relied upon by the Court of Appeals is

not well taken. In the first place, the scope of judicial review is determined specifically by the particular statute under which the judicial review is requested. Cross v. United States, supra, at 1220. Thus using an interpretation of one statute which provides for judicial review to aid in interpreting another, and dissimilar, statute which provides for judicial review is inappropriate. Rather you must look specifically to the statute in question, in this case the Food Stamp Act. There are significant differences between the scope of review as provided by the Commodity Exchange Act and the Perishable Agricultural Commodities Act and the scope of judicial review provided by the Food Stamp Act. The Food Stamp Act provides for a "trial de novo" at the District Court level. However, in both the Perishable Agricultural Commodities Act and the Commodity Exchange Act "... the

Circuit Courts of Appeal are petitioned directly to review orders of the Secretary of Agriculture, such orders being issued only after completion of full administrative hearings." (Emphasis added) Goodman v. United States, supra, at 511. There is a significant difference between a trial de novo in a United States District Court and a direct appeal to the United States Court of Appeals. If the Food Stamp Act provided merely for a direct appeal from the orders of the Department of Agriculture to the United States Court of Appeals, then, and in that event only, the standard of review would be as described in Butz v. Glover Livestock Commission Company, Inc., supra. However, there is no direct appeal under the Food Stamp Act and the Supreme Court should distinguish the Butz case from the instant case.

An additional reason for granting the petition is that merchants operating under

the Food Stamp Act in one section of the country can have their periods of disqualification judicially reviewed and the sanctions reduced. However, in other circuits the period of disqualification, regardless of how arbitrary and capricious, is not subject to review by the District Courts. This is a discrimination which is due entirely to geography and has no rational basis whatsoever. Thus, the laws of the United States are not equally enforced throughout the country.

VIII. CONCLUSION

The Supreme Court of the United States should grant certiorari since there is a conflict between the decisions of the United States Courts of Appeal, and because this conflict in the decisions has resulted

in unequal and unjust application of the laws.

Robert J. DuComb, Jr.
of
DU COMB, NIMTZ & DU COMB
511 West Colfax Avenue
South Bend, Indiana 46601
Telephone: (219) 233-3147
Attorney for Keith Nowicki
d/b/a K & F Food Market

Supreme Court, U. S.
FILED
NOV 2 1976
MICHAEL RODAK, JR., CLERK

NO. 76-6211

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

KEITH NOWICKI d/b/a
K & F FOOD MARKET

Petitioner

v.

UNITED STATES OF AMERICA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

ROBERT J. DU COMB, JR.
of
DU COMB, NIMTZ & DU COMB
511 West Colfax Avenue
South Bend, Indiana 46601
Telephone: (219) 233-3147

Attorney for Keith Nowicki

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

KEITH NOWICKI d/b/a
K & F FOOD MARKET

Petitioner

v.

UNITED STATES OF AMERICA

APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI

ROBERT J. DU COMB, JR.
of
DU COMB, NIMTZ & DU COMB
511 West Colfax Avenue
South Bend, Indiana 46601
Telephone: (219) 233-3147

Attorney for Keith Nowicki

TABLE OF CONTENTS (cont.) Page

APPENDIX F - PERTINENT REGULATIONS OF THE FOOD STAMP PROGRAM WHICH WERE IN EFFECT IN 1971 AND WHICH WERE REPLACED BY THE REGULATIONS SET FORTH IN APPENDIX E 48

7 C.F.R. 1602.2(b) (1970) 48

7 C.F.R. 1600.2(i) (1970) 49

7 C.F.R. 272.6(b), (c) (1971) 49

7 C.F.R. 1602.6(a) (1970) 50

APPENDIX G - RULE 19(1)(b) OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES 51

APPENDIX A

ADMINISTRATIVE DECISIONS

BY

UNITED STATES

DEPARTMENT OF AGRICULTURE

UNITED STATES DEPARTMENT OF AGRICULTURE
FOOD AND NUTRITION SERVICE
Midwest Regional Office
536 South Clark Street
Chicago, Illinois 60605

March 24, 1971

Mr. Keith Nowicki, Owner
K & F Food Market
239 South Chapin Street
South Bend, Indiana 46625

Dear Mr. Nowicki:

Administrative review and evaluation have been made of the information and evidence available to us relating to our letter of charges dated January 13, 1971, including your reply of January 15, 1971. Based on the review of the information and evidence, and pursuant to Section 272.6 (c) of the Food Stamp Program Regulations, it is the determination of the Director, Food Stamp Division, Food and Nutrition Service, U. S. Department of Agriculture:

1. That you or your employees violated the regulations governing the Food Stamp Program, 7 C.F.R. 1600 (30 F.R. 4315

as amended 30 F.R. 8155), 1602 (30 F.R. 6859 as amended 30 F.R. 13861, 32 F.R. 8519, 34 F.R. 15785, 35 F.R. 4325 and 35 F.R. 4610), and 1603 (30 F.R. 13132) (renumbered 7 C.F.R. 270 - 274), in the manner specified in the letter of charges to you dated January 13, 1971.

2. That K & F Food Market at 239 South Chapin Street, South Bend, Indiana, under the ownership of Mr. Keith Nowicki, shall be disqualified from the privilege of participation in the Food Stamp Program for a period of one year.

Therefore, you are hereby notified that K & F Food Market under the ownership of Mr. Keith Nowicki is disqualified from participation in the Food Stamp Program and Authorization Number IN-27-20 is revoked effective ten calendar days from receipt of this notice.

However, you may apply for reinstatement beginning ten days prior to the expiration of the one year period of disqualification. If your application is approved, you will be issued a new authorization number and card upon completion of your disqualification period.

Authorization Card No. IN-27-20 and all posters, forms, and other official material relating to the program must be surrendered on the above effective date to Mr. Donald C. Thompson, Officer-in-Charge, U. S. Department of Agriculture, Food and Nutrition Service Field Office, Room 228, Law Building, 125 South Lafayette Street, South Bend, Indiana 46601.

Banks and wholesalers will be notified not to accept coupons from your store after the effective date of this order. Any accept-

able coupons on hand at that time may be redeemed if they are presented to Mr. Thompson for examination within three days after the effective date.

This determination of disqualification shall be final unless you submit a written request for review to the Food Stamp Review Officer, Food and Nutrition Service, U. S. Department of Agriculture, Washington, D. C. 20250, prior to said effective date. If a timely request for review is made, administrative action will be held in abeyance, as provided in Part 273 (30 F.R. 13132) of the regulations, until a decision on your request has been made by the Food Stamp Review Officer. A copy of the regulations governing the Food Stamp Program is attached for your information in this regard.

This action is taken under the authority of Section 272.6 (a) of the regulations governing the Food Stamp Program.

This determination of disqualification from participation in the program shall not preclude the Department of Agriculture or any other agency or department of the United States from taking further action to collect any claim determined under the regulations governing the Food Stamp Program or under any other pertinent statutes or regulations, nor shall this determination preclude prosecution under any applicable penal statutes.

Sincerely,

/s/ Bernard J. Franta
BERNARD J. FRANTA
Supervisor, Food Stamp Program

Enclosure

UNITED STATES DEPARTMENT OF AGRICULTURE
FOOD AND NUTRITION SERVICE
Washington, D.C. 20250

April 27, 1971

Mr. Keith Nowicki, Owner
K & F Food Market
239 South Chapin Street
South Bend, Indiana

Dear Mr. Nowicki:

Careful consideration has been given to the information you have provided in support of your position that the K&F Food Market and you, as owner, should not be disqualified from participation in the Food Stamp Program.

In determining the extent of compliance at your store, nonfood items were purchased with Food Stamps on each of five separate occasions. Thirty of 55 items sold were ineligible. They included such items as costume jewelry, pantyhose, gloves, furniture polish, beer on two occasions, malt liquor, and cigarettes on four occasions. Your son was the clerk at one transaction and your clerk, Glinnie Ward was involved in the other four.

Your store was authorized to accept Food Stamps in March of 1969. Subsequent to that date, seven educational or complaince visits were made to your store. You were contacted during five of these visits. The purpose of these visits was to assure that you and your employees were familiar with the Regulations which set forth program requirements and that all concerned understood the need for strict compliance therewith.

Upon confrontation shortly after the violations occurred, you denied any knowledge of violations taking place in your store. Your son,

the store manager, stated he did not remember selling nonfood items for Food Stamps and, if he did, the items slipped through without his noticing it. Miss Ward admitted selling nonfood items on various occasions, giving as her reasons the failure of stamp customers to identify themselves and the fear of reprisal if she refused.

On March 29, 1971, you requested an administrative review of the one-year period of disqualification imposed by the Food Stamp Division. In your letter, you stated that some 37 1/2 percent of your business was in Food Stamps and a one-year disqualification might well put you out of business. You said that your son had advised you that he did not violate Program Regulations and that you believed him. Miss Ward's actions were attributed to her fear of harm that might come to her if she refused to comply with customers demands for nonfood items. You further stated that you should not be penalized for acts of your employees as long as you did not violate the Regulations yourself.

A period of disqualification often results in economic hardship, particularly if the store is located in a low income area. However, we must consider the interests of the program and the fairness and equity which must be shown, not only to competing stores, but also to all participating retailers who are complying with Program Regulations. We must also be fair to those retailers who in the past have been disqualified from the program for similar violations.

You have pointed out a problem which arises in handling Food Stamp transactions in the area where your store is located. This is the fear of your employees not to meet the demands of Food Stamp customers to purchase

ineligible items. Such may be the case in some instances. However, if the retailer is to operate within program requirements, as he agreed to do at the time he signed his application, he or his employees cannot yield to such demands or desires of Food Stamp customers in complete contravention of Program Regulations. Otherwise, the successful continuation of the program is seriously jeopardized.

For the Food Stamp Program to achieve its purpose as provided by law, it is essential that the Regulations governing the program be strictly adhered to and that Food Stamp coupons be accepted only for eligible food items purchased at the time the coupons are presented by eligible coupon holders. Violations of the Regulations become known to an increasing number of Food Stamp recipients, to other participating stores, and, to a degree, to the general public. This has a damaging impact on the image and success of the program, especially if the violating store is permitted to continue uninterrupted participation in the program.

Based on the review of the information before me, I must conclude that violations set forth in the Letter of Charges did, in fact, occur at K&F Food Market. I can find no extenuating circumstances with respect to these violations. Rather, I find that they were committed with full knowledge of, and a complete disregard for, the Food Stamp Program Regulations. The violations were not only most serious in nature, but I also find that you, as owner, failed in your responsibility to assure yourself that Program requirements were being observed in your store.

I am, therefore, sustaining the action by the Food Stamp Division in disqualifying K&F Food

Market and you, Keith Nowicki, as owner from participating in the Food Stamp Program for a period of one year. This period of disqualification shall begin 15 days after the receipt of this letter. You may reapply for participation in the program by submitting a new application 10 days prior to the termination of the disqualification period.

Your attention is called to Section 13 of the Food Stamp Act and to Section 273.10 (formerly 1603.10) of the Regulations with respect to your right to a judicial review of this determination. Please note that if a judicial review is desired, the complaint to the court must be filed within 30 days of your receipt of this letter. Earlier action is desirable if you wish to seek from the court a stay in the disqualification action, pending the court's review of the matter.

Very truly yours,

/s/ Marshall F. Spear
Marshall F. Spear
Food Stamp Review Officer
Food and Nutrition Service

APPENDIX B

MEMORANDUMS OF DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

KEITH NOWICKI d/b/a K & F FOOD MARKET 230 South Chapin Street South Bend, Indiana, Plaintiff	)	
v.	)	CIVIL NO. 71 S 83
THE UNITED STATES, Defendant.	)	

M E M O R A N D U M AND O R D E R

The above-entitled action was brought by Plaintiff Keith Nowicki, pursuant to 7 U.S.C. § 2022, seeking judicial review of administrative action taken by the Department of Agriculture disqualifying plaintiff from participation in the Food Stamp Program for one year as a consequence of a finding that plaintiff had violated certain provisions of the Food Stamp Act of 1964 and food stamp regulations.

Plaintiff, who operates a small food store, the K & F Food Market, at 239 South Chapin Street, South Bend, Indiana (a low income neighborhood), joined the Food Stamp Program on 12 March 1969 and since that time a significant portion of his store's business

has been related, directly or indirectly, to the Food Stamp Program.

Pursuant to 7 U.S.C. §2022, this court held a "trial de novo" to "determine the validity" of the administration action in this cause. At trial plaintiff argued that his disqualification by the agency was invalid on the grounds that the regulations which he was alleged to have violated were not in existence at the time of the administration action, and that the agency failed to properly inform him of the alleged violations and afford him a full evidentiary hearing prior to its final determination.

In reviewing the agency's action under 7 U.S.C. §2022, this court is only empowered to determine the validity of the action. Save More of Gary, Inc. v. United States, 309 F.Supp. 39 (N.D.Ind. 1970), aff'd 442 F.2d 36 (7th Cir. 1971).

The evidence shows that in November 1970, investigative aides from the Food Stamp Program went to plaintiff's store and thereafter reported to their superiors that on five occasions they were sold non-food items and alcoholic beverages in exchange for food stamps and that during one purchase the customer was given less change than he or she should have received. On 13 January 1971, plaintiff was notified by the Midwest Regional Office of the Food Stamp Program that there was reason to believe that his store was violating the terms and provisions of the regulations which governed the Food Stamp Program. The letter described the five instances when alcoholic beverages and non-food items were sold for food stamps in violation of 7 C.F.R. §§1600.2(i) and 1602.2(b), and the one instance where the incorrect amount of change was given in violation of

7 C.F.R. §1602.2(b). In the letter, the Regional Office stated that if Mr. Nowicki wished to submit any information, explanation, or evidence concerning the incidents in question, he could reply either orally or in writing within two weeks. Thereafter, plaintiff Nowicki appeared before the Officer-in-Charge at the Food Stamp and Nutrition Service Field Office, South Bend, Indiana, and asserted that he never violated the food stamp regulations and had instructed his employees not to do so. On 18 January 1974 the Officer-in-Charge submitted his summary of the case and a recommendation that the store be disqualified from participation in the program for one year. On 23 February 1971 the Director of the Food Stamp Division in Washington, D. C., advised the Director of the Midwest Region of his determination that the K & F Food Market should be disqualified for one year and instructed that a notice of disqualification be issued. Accordingly, on 24 March 1971, Plaintiff Nowicki was sent a notice of disqualification, informing him that upon review and evaluation of the charges and Mr. Nowicki's reply, the Director of the Food Stamp Division had determined that the store employees violated the regulations governing the Food Stamp Program in the manner specified in the letter of charges dated 13 January 1971 and that the store would be disqualified from participating in the Program for a period of one year. This action was said to be taken under Section 272.6(a) of the regulations governing the Food Stamp Program. Mr. Nowicki was informed that the determination would be final unless he submitted a written request for review to the Food Stamp Review Officer, Food and Nutrition Service, U. S. Department of Agriculture, Washington, D. C., prior to the effective date of the determination, within ten days from receipt of the notice. A copy

of the regulations governing the Program was provided with the notice. On 29 March 1971 Mr. Nowicki submitted his request for review. In his request, he noted that his son had denied the one violation with which he stood charged, but his store clerk, who was charged with the other sales of improper items, had admitted such violations. He explained that his clerk had made the sales in question out of fear of reprisals from the customers if she had refused to accept food stamps for the purchases and he explained his store's economic reliance on the Food Stamp Program. Subsequently, on 2 April 1971, plaintiff was notified that he would be granted a review and was given the name and business address of the officer who would handle same. Plaintiff was directed to submit any additional information he wished to have considered to the Review Officer by 15 April 1971. He was also advised that the disqualification would be held in abeyance until after the Review Officer had made his determination. Finally, on 27 April 1971 the Review Officer notified Mr. Nowicki that he had determined that Nowicki's store should be disqualified from participating in the program for one year. The reviewer found that there were no extenuating circumstances justifying the violations (most of which had been admitted) and that the acts in question were committed with full knowledge of, and in complete disregard for, the regulations and that Mr. Nowicki, as the store owner, had failed to assure himself that the regulations were being observed in his store. The notice advised Mr. Nowicki of his right to seek judicial review in federal court within 30 days. Such review was timely sought and an order was entered, with the agreement of the parties, staying the disqualification until further order of this court.

In November 1970, when the violations in question here occurred, the agency regulations, as promulgated in 7 C.F.R. § 1602.2 (b) [30 F.R. 6859, May 20, 1965, as amended in 30 F.R. 13861, Nov. 2, 1965], required retailers participating in the Program to accept coupons only in exchange for eligible foods as defined in 7 C.F.R. § 1600.2(i), and at the prices and on the same terms applicable to cash purchases. 7 C.F.R. § 1600.2(i) [30 F.R. 8155, June 21, 1965] defines eligible foods as food products for human consumption, except alcoholic beverages, tobacco, and imported food items. Plaintiff was found to have violated these regulations by sales of non-food items, beer and cigarettes, and by failing to give the proper change to a customer in food stamp transactions. At the time these violations allegedly occurred, 7 C.F.R. § 1602.6 provided that upon violation of the regulations, a retailer could be disqualified from participation in the program for any period of time, not to exceed three years. On 30 December 1970 a revision and reissuance of the regulations formally appeared at 7 C.F.R. §§ 1600-1604. See 35 F.R. 19737. Pursuant to that promulgation, certain provisions were revised and Sections 1600-1604 of 7 C.F.R. were deleted, and the regulations contained therein were renumbered 7 C.F.R. §§ 270, 271, 272, 273 and 274, respectively. The sections which plaintiff was charged with violating, 7 C.F.R. §§ 1602.2(b) and 1600.2(i), were merely renumbered 7 C.F.R. §§ 272.2(b) and 270.2(i), respectively, but were otherwise left unchanged. While 7 C.F.R. § 1602.6 was revised and renumbered 7 C.F.R. § 272.6, that rule still provided a penalty of up to three years' disqualification for a violation of the regulations. Plaintiff's contention that the revision of the regulations, which he was charged with violating, should abate any

attempt to censure him for his actions is without merit. Certainly, the mere renumbering of the pertinent regulations would not prevent all administrative prosecution of previous violations.

It is equally evident that the determination to disqualify plaintiff's store was made in accord with all of the procedures which were prescribed in the applicable statutes and regulations. The Food Stamp Act provided that any retailer who violated the provisions of the statute, or the regulations established pursuant thereto, could be disqualified from participation in the Program for such a period of time as might be determined in accordance with the regulations. 7 U.S.C. § 2020, 78 Stat. 707 (1964). As noted above, the pertinent regulations provided a penalty of disqualification for any period up to three years. The Act provided that whenever an administrative determination was made that a store should be disqualified from the Program, the store should be given notice of the administrative action; and if it was aggrieved by such action, it could, within ten days of notification, file a written request to submit information in support of its position to the person designated by the regulations. When such a request has been made, the designated person should review the material submitted by the store, along with all other available information, and make a final determination which would be subject to the store's right to judicial review. 7 U.S.C. § 2022, 78 Stat. 707 (1964). The regulation provided additionally that, prior to any determination of disqualification, the retailer should be given notice of the charges against him and an opportunity to respond to the Officer-in-Charge at the Field Office and that after any determination of disqualification, the

retailer should, upon request, be provided with a review by the Food Stamp Review Officer with the opportunity to appear in person before the Reviewer, if such be desired. 7 C.F.R. §§ 272.6, 272.8 and 273.5-273.10. (35 F.R. 19727, et seq., Dec. 30, 1970).

It is clear from this recitation of the administrative record that the agency has fully complied with all of the procedural requirements in making its determination, pursuant to the applicable statutes and regulations, and has given plaintiff full and proper notice of all action regarding his case and his rights under the statutes and regulations.[1] At trial, plaintiff argued that he should have been afforded a full evidentiary hearing at the administrative level. However, the statutes and regulations as set forth above make no provision for such a hearing and, indeed, plaintiff was not entitled to such. See Save More of Gary, Inc. v. United States, 442 F.2d 36, 38 (7th Cir. 1971).

Inasmuch as the evidence presented to this court has established that plaintiff committed a violation of the regulations,[2] and the agency determination of the violation and resulting disqualification were arrived at in full compliance with the applicable statutes and regulations, and the period of disqualification imposed was within the limits of the regulations,[3] this court hereby finds that the agency's determination of disqualification was valid. Accordingly, this court finds that judgment should be entered for Defendant United States of America and ORDERS that the injunction previously entered in this action be DISMISSED.

The foregoing Memorandum and Order shall constitute the findings of fact and conclu-

sions of law under Rule 52, F.R.Civ.P., and the Clerk of the Court is hereby directed to enter judgment accordingly.

/s/ Robert A. Grant
DISTRICT JUDGE

ENTER: November 22, 1974

1/ Plaintiff's counsel asserted that when plaintiff received notice from the agency officials, he was given a copy of the regulations which were not yet in effect. This court notes that while plaintiff's case was being handled by the agency, new regulations were under consideration. If the agency sent these regulations to plaintiff, such would have been a mistake. However, such a mistake could have in no way affected plaintiff's understanding of his rights, since the new regulations (36 F.R. 14102, effective July 29, 1971) set forth identical procedures for handling of cases as did the old regulations (35 F.R. 19737, et seq., effective Dec. 30, 1971). The new regulations also contained the same prohibitions and penalties as the earlier regulations.

2/ As noted above, plaintiff's store clerk admitted that she had sold ineligible items in exchange for food stamps.

3/ This court does not intend, by this Order, to express approval of the long period of disqualification which was imposed in this case. However, the penalty was within the prescribed limits and this question is not before the court. Martin v. United States, 459 F.2d 300 (6th Cir. 1972).

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

KEITH NOWICKI D/B/A)
K & F FOOD MARKET)
)
VS.) CIVIL NO. 71-S-83
)
THE UNITED STATES)

MODIFIED MEMORANDUM AND ORDER

This action came on for further proceedings and the presentation of additional evidence by the parties before the Court, Honorable ROBERT A. GRANT, United States District Judge, presiding, pursuant to order of the Court issued by the presiding Judge, February 24, 1975.

The issues having been duly reopened and additional evidence having been received by the Court from the parties, the Memorandum and Order heretofore rendered by this Court on the 22nd day of November, 1974 is hereby modified, in that the Court does now hereby reaffirm and readopt the original Memorandum and Order, with the exceptions that the Court NOW FINDS that it does, indeed, have the power and authority to review the validity of the penalty imposed, which question was not considered by this Court in its Memorandum and Order of November 22, 1974, and that the period of disqualification imposed, although within the limits of the regulations, was too harsh a sanction as to the plaintiff herein, and that said agency's determination of disqualification is invalid.

Accordingly, this Court FINDS that the Memorandum and Order hereinbefore filed in this cause is now modified and that judgment should be entered for defendant, United States of America, but does hereby order that the period of disqualification imposed shall be for a period of one hundred twenty (120) days, commencing on the 14th day of May, 1971. And the court FURTHER FINDS that plaintiff has been suspended for a period of twenty-six (26) days, from the 14th day of May, 1971 through the 8th day of June, 1971, both inclusive, and has further been suspended from the 12th day of December, 1974 to the date of this Order, both inclusive, and that, therefore, plaintiff shall be eligible for reinstatement as a participant in the United States Department of Agriculture Food Stamp Program on the 15th day of March, 1975, and be entitled to reapply for participation in said Program ten (10) days prior to said date. IT IS FURTHER ORDERED that the injunction previously entered in this action be dismissed.

The foregoing modified Memorandum and Order shall constitute the Findings of Fact and Conclusions of Law under Rule 52, Federal Rules of Civil Procedure, and the Clerk of the Court is hereby directed to enter judgment accordingly.

/s/ Robert A. Grant
District Judge

ENTER: March 26, 1975

NOTE: This Court now cites the 7 February, 1975 en banc opinion of the Fourth Circuit Court of Appeals in Cross v. U. S., (see 43 Law Week, 2343, C.A. 4, Feb. 18, 1975).

APPENDIX C

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

In the United States Court of Appeals
For the Seventh Circuit

No. 75-1685

KEITH NOWICKI, d/b/a
K & F FOOD MARKET,

Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division
No. 71-S-83
ROBERT A. GRANT, *Judge*

ARGUED APRIL 7, 1976 — DECIDED JUNE 22, 1976

Before HASTINGS, *Senior Circuit Judge*, BAUER, *Circuit Judge*, and WYZANSKI, *Senior District Judge.**

HASTINGS, *Senior Circuit Judge.* Keith Nowicki, a resident of Indiana, doing business under the firm name and style of K & F Food Market, at 239 South Chapin Street, South Bend, St. Joseph County, Indiana, was engaged in the operation of a small retail food store. On March 12, 1969, Nowicki joined the Food Stamp Program and thereafter a significant portion of his business was directly or indirectly related to this program.

* The Honorable Charles Edward Wyzanski, Jr., Senior United States District Judge for the District of Massachusetts, is sitting by designation.

On May 27, 1971, Nowicki brought this action in the United States District Court for the Northern District of Indiana, South Bend Division,[1] for a judicial review pursuant to the the provisions of the Food Stamp Act of 1964, 7 U.S.C. § 2022 (the Act). Plaintiff Nowicki sought judicial review of administrative action taken by the Department of Agriculture through its Food and Nutrition Service on April 27, 1971, disqualifying him from participation in the Food Stamp Program for one year as a consequence of a finding that plaintiff had violated certain provisions of the Act and food stamp regulations.

Pursuant to § 2022 of the Act, the district court held a "trial de novo" to "determine the validity" of the administrative action here involved. In a detailed unreported memorandum of decision, the district court meticulously reviewed the entire administrative action and found "that the agency has fully complied with all of the procedural requirements in making its determination." In its memorandum of decision, the court further stated that "plaintiff committed a violation of the regulations, and the agency determination of the violation and resulting disqualification were arrived at in full compliance with the applicable statutes and regulations, and the period of disqualification imposed was within the limits of the regulations," and the court concluded that "the agency's determination of disqualification was valid."

The district court further found and held that under § 2022 of the Act, it was only empowered to determine the validity of the agency's action, citing *Save More of Gary, Inc.* v. *United States,* 7 Cir., 442 F.2d 36, *cert. dismissed,* 404 U.S. 987 (1971), affirming Judge Beamer's decision in *Save More,* N.D. Ind., 309 F. Supp. 39 (1970). Judge Beamer in *Save More,* 309 F. Supp at 39, cited and relied upon Judge Robson's decision in *Marbro Foods, Inc.* v. *United States,* N.D. Ill., 293 F. Supp. 754 (1968).

In the case at bar, the district court stated in a footnote to its memorandum and order: "This court does not intend, by this Order, to express approval of the long period of disqualification which was imposed in this case. However, the penalty was within the prescribed limits and

[1] The Honorable Robert A. Grant, Senior United States District Judge, presiding.

this question is not before the court. *Martin* v. *United States,* 459 F.2d 300 (6th Cir. 1972) [*cert. denied,* 409 U.S. 878]."[2]

On November 22, 1974, the district court entered judgment for defendant United States and dismissed a prior injunction. Plaintiff did not file a written notice of appeal from this final judgment.

On February 24, 1975, 94 days after the entry of judgment, the district court *sua sponte* entered an order reopening the November 22 judgment in view of a February 7, 1975, en banc opinion in *Cross* v. *United States,* 4 Cir., 512 F.2d 1212 (1975), holding, according to the district court, "that the demands of procedural due process require that a United States District Court does indeed have the power and authority to review not only the fact of a violation of the Food Stamp Act, but also to review the validity of the penalty imposed, which latter question was not considered by this Court in its Memorandum and Order herein of 22 November, 1974." It was thereupon ordered by the district court that a hearing of any needed additional evidence and oral argument be held on the question of the validity of the sanction imposed in the instant case.

After further proceedings and the receipt of additional evidence, citing *Cross* as authority, the district court modified its November 22, 1974, judgment for the United States, ruling "that the period of disqualification imposed, although within the limits of the regulations, *was too harsh a sanction* as to the plaintiff herein, and that said agency's determination of disqualification is invalid." (Emphasis added.) The district court then ordered that plaintiff's disqualification be reduced from one year to 120 days and entered judgment thereon.

The United States appealed. We reverse.

I.

Under the posture of this case, the relevant portions of § 2022 of the Act, governing judicial review by the district court, read:

[2] Pursuant to 7 C.F.R. § 272.6(a) (1976), the maximum period of disqualification is three years.

> If the store or concern feels aggrieved by such final determination [by the administrative agency] he may obtain judicial review thereof by filing a complaint against the United States in the United States district court * * *. The suit in the United States district court * * * shall be a *trial de novo* by the court in which the court shall determine the validity of the questioned administrative action in issue. If the court determines that such administrative action is invalid it shall enter such judgment or order as it determines is in accordance with the law and the evidence. (Emphasis added.)

The issues raised by the Government on this appeal are:

(1) whether the "trial de novo" provision of the Food Stamp Act authorized a district court to modify a disqualification period that was "validly" imposed by the agency;

(2) whether the administrative action establishing the disqualification period in this case was valid; and

(3) whether the district court had power to change its own final judgment in this case after the appeal time had run.

We first take note of what the district court did and did not do in its actions below.

In its judgment order of November 22, 1974, the court ordered that plaintiff Nowicki take nothing by his complaint and rendered judgment in favor of defendant United States, finding that the agency's determination of disqualification was valid. The court did not reach or rule upon the validity of the sanction imposed.

In its order of February 24, 1975, the court stated that it would hear any needed additional evidence and oral argument on the question of the validity of the sanction imposed by the agency against the plaintiff.

In its judgment order of March 26, 1975, the court modified its Memorandum and Order entered on November 22, 1974, "in that the Court does now hereby reaffirm and readopt the original Memorandum and Order,"

with the exception that the administrative sanction was modified so that the period of disqualification was imposed for a period of 120 days rather than one year. Judgment was again entered "that the Plaintiff take nothing by his Complaint herein," and "that the period of disqualification imposed shall be for a period" of 120 days with stated implementing provisions.

In short, except for the modification of the sanction imposed, plaintiff took nothing by his complaint, and the Government's determination of plaintiff's disqualification was found to be valid.

II.

The Government has raised the preliminary question of the district court's power to change its final judgment in this case after the appeal time had run, in view of the time limitations imposed by Rule 59(e), and thereafter, in "extraordinary situations," by Rule 60(b), and particularly Rule 60(b) (6), of the Federal Rules of Civil Procedure, 28 U.S.C. We have examined the authorities which restrict the court in relieving a party from a final judgment pursuant to Rule 60(b) (1), (2) and (3), to a "reasonable time" not more than one year after the judgment was entered, and which, refusing to expand that period for relief under Rule 60(b) (6), limit it to the time allowed for appeal from the judgment. *See Swam* v. *United States,* 7 Cir., 327 F.2d 431, *cert. denied,* 379 U.S. 852 (1964); 7 J. MOORE, FEDERAL PRACTICE ¶ 60.22 [3-4] (2 ed. 1975). However, in a number of cases this rule has been relaxed to authorize granting a motion for relief. *See System Federation No. 91, Railway Employees Department, AFL-CIO* v. *Wright,* 364 U.S. 642 (1961) (12 years after imposition of the original injunction); *Polites* v. *United States,* 364 U.S. 426 (1960) (4 years after the original judgment); *Klapprott* v. *United States,* 335 U.S. 601 (1949) (more than 4 years after the judgment).

There is respectable authority holding that the "reasonable time" limitation under Rule 60(b) (6) rests within the sound discretion of the trial court and, absent abuse, it brings to bear a more liberal attitude where no intervening rights have been affected by the passage of time between judgment and motion. *Bridoux* v. *Eastern*

Airlines, Inc., D.C. Cir., 214 F.2d 207, 209-10, *cert. denied*, 348 U.S. 821 (1954). Applying this principle to the case at bar, Nowicki's rights had remained the same and the Government had not been adversely affected by the passage of time since no action had been taken in reliance on the district court order in issue. All things being considered here, we cannot say that the district court's action was not made in a reasonable and timely manner, pursuant to Rule 60(b).

III.

In *Marbro Foods*, 293 F. Supp. at 755, Judge Robson spelled out the administrative action which determined that Marbro Foods had been properly found to be in violation of the Food Stamp Program and had been disqualified for a period of 60 days. The district court held that the corporate agency was responsible for the acts of its agents even though the owners knew nothing of the violations and tried to prevent them from occurring. The court further found that the disqualification period was "for a reasonable, definitely-stated period of time." The court held that the "*scope of judicial review for administrative decisions made under the Food Stamp Program was limited by Congress to a determination as to whether the agency's decision is valid*" under § 2022 of the Act. (Emphasis added.) *Id.* It further found and held that there was "substantial evidence to support the agency's decision in disqualifying the plaintiff from participation in the Food Stamp Program for 60 days." *Id.* Summary judgment was granted and the cause was dismissed.

In *Save More of Gary, Inc.*, Judge Beamer, after citing § 2022 and *Marbro Foods*, found that plaintiff's contentions amounted to excuses which could be taken into account by the agency in determining the period of disqualification and were not "sufficient here to challenge the validity of the disqualification itself." 309 F. Supp. at 40. The court found that the record clearly established the violations and that the 30 day period of disqualification did not seem unduly harsh or arbitrary. The court then concluded that the decision to disqualify was valid and granted summary judgment as a matter of law.

On appeal in this court, after reviewing the entire administrative action and record in the district court, we found that the violations charged did in fact occur and that the proofs offered by plaintiff were relevant only in explanation and mitigation, but not in denial of the violations, leaving the district court with only the disposition of legal issues. *Save More of Gary, Inc.*, 442 F.2d at 39. We further found that *Marbro Foods* could not be distinguished from the case at issue and that the Act "makes no provision for such mitigating factors to nullify a violation, although clearly these aspects were considered in determining the penalty." *Id.* Finally, and critical to the determination of the case at bar, we held that the district court did not unduly limit the scope of judicial review, determining merely whether the agency's decision was valid, and that this complied with the requirement of a trial de novo in determining the validity of the questioned administrative action. We affirmed the ruling of the district court.

We have set out the foregoing to show the background for the decision of our court as the law of this circuit. That decision is a binding circuit precedent. The district court properly relied upon *Save More* in its initial decision. However, after reading the Fourth Circuit's decision in *Cross*, the court obviously did not read *Save More* as being applicable to the limitation of the scope of judicial review in its review of the sanction.

In *Martin* v. *United States, supra,* cited favorably by the district court in its initial decision in this case, the Sixth Circuit, shortly after our decision in *Save More,* expressly held that the district court did not have authority to modify an administrative agency determination disqualifying plaintiff's retail food stores from participating in the Food Stamp Program by reducing the period of disqualification from six months to 30 days, where the violations were clearly established and the sanctions imposed were well within the range fixed by the statute and regulation. There, Judge Weick, writing for the majority, carefully reviewed the relevant sections of the statute and regulations and concluded that the district court was authorized to "enter such judgment or order as it determines is in accordance with the law and the evidence," only if it determined that the administrative action was

invalid. 459 F.2d at 302. There, as in the case at bar, the district court made no such determination of invalidity.

The Sixth Circuit further concluded that in the Act "no authority was conferred on the District Court to change the period of suspension ordered by the Secretary, or to impose new sanctions." *Id.* We agree. Judge Weick also noted with approval our prior holding that sanctions imposed by the Secretary of Agriculture under the Commodities Exchange Act were not subject to judicial review. *G. H. Miller & Co.* v. *United States,* 7 Cir., 260 F.2d 286, 290 (1958) (en banc), *cert. denied,* 359 U.S. 907 (1959). To the same effect under the Perishable Agricultural Commodities Act, see *Eastern Produce Co.* v. *Benson,* 3 Cir., 278 F.2d 606, 610 (1960). Being unable to find any substantial difference between the review provided by those acts and that provided by the Food Stamp Act, the court in *Martin* held that the reviewing court lacked authority to change the sanctions imposed by the Secretary. Judge Edwards filed a brief dissent in which, although he did not deny that "there is force to the arguments of" the majority, he stated that he felt that the term "trial de novo" gave "to the reviewing court all the power that the court or agency below possessed, including the power to enter a disposition or judgment different from that originally entered." 459 F.2d at 302.

IV.

In *Welch* v. *United States,* 4 Cir., 464 F.2d 682 (1972), in an opinion authored by Circuit Judge Field, the court held that, under the Food Stamp Act, a district court may not reduce an administratively imposed sanction for admitted violations of the Act, when the sanction so imposed is within the allowable range of the statute and implementing regulations, and that the court may not go beyond the issue of the validity of the disqualification action and modify the period of the administrative sanction. The court cited with approval *Martin* v. *United States, supra,* by the Sixth Circuit, *Save More of Gary, Inc.* v. *United States, supra,* by the Seventh Circuit, and *Marbro Foods, Inc.* v. *United States, supra,* by the Northern District of Illinois. Circuit Judge Butzner concurred in the result, but on the grounds that the sanction imposed was not arbitrary and capricious and, therefore, it was not invalid.

In *Cross* v. *United States, supra,* the Fourth Circuit, sitting en banc to resolve the difference in views expressed by the panel in *Welch* v. *United States, supra,* decided, by a divided court, to adopt the minority view in *Welch.*[3] The majority in *Cross* held "that the scope of judicial review extends to the period of administrative sanction, notwithstanding that the Secretary did not impose a penalty exceeding that permitted by the statute or the regulations." 512 F.2d at 1215. It set aside the majority view in *Welch,* although the judgment was unaffected. The en banc majority rejected the district court's characterization of the sanction as "harsh" as not being the proper test. Rather, it held that "only in those instances in which it may be fairly said on the *de novo* record as a whole that the Secretary, acting through his designates, has abused his discretion by acting arbitrarily or capriciously, would the district court be warranted in exercising its authority to modify the penalty." *Id.* at 1218. It apparently grounded its decision upon considerations of constitutional due process.

Judge Widener concurred on separate grounds. Judge Field dissented, adhering to the views expressed in his original opinion in *Welch,* noting that the majority was at odds with every other federal court that had had occasion to consider the question, citing *Martin* and *Save More* and six district court cases. 512 F.2d at 1221. Judge Russell concurred in the dissenting opinion of Judge Field and wrote an extended well documented opinion critical of the majority's rationale. With due deference to the majority, we agree with the well reasoned dissents of Judges Field and Russell.[4]

---

[3] Citing in a footnote Judge Edwards' dissent in *Martin* v. *United States, supra.*

[4] We have examined the legislative history of the Food Stamp Act of 1964 as set out in 1964 U.S. CODE, CONG. & ADMIN. NEWS, at 3288-3292. Other than providing in Section 4 that the Secretary of Agriculture shall have general authority to formulate and administer a food stamp program; in Section 11, that the Secretary has authority for the disqualification of a participant who has not adhered to the requirements established in the Act; and in Section 13, making provisions "for administrative and judicial review of the decision of the Secretary with respect to * * * the disqualification of such a participating concern [a retail or wholesale food concern]," the history is silent on the resolution of the question at issue in the instant case.

In *Goodman* v. *United States,* 5 Cir., 518 F.2d 505 (1975), the court found itself in agreement with Judge Edwards' dissent in *Martin* and the concurring opinion of Judge Butzner in *Welch*. It was in disagreement with our opinion in *Save More*. Although finding itself in agreement with the majority result reached in *Cross*, it reached the same result by a construction of what it thought to be the plain language of the statute and a consideration of the inner workings of the Act, rather than the external application of the considerations of due process. It rejected the analogy of the sanctions imposed by the Secretary under both the Commodity Exchange Act and the Perishable Agricultural Commodities Act which have been held not subject to judicial review. It finally concluded that the district court can review both the determination of violation and the administrative sanction under § 2022. In spite of the subsequent conflicting decisions of the Fourth and Fifth Circuits, however, we continue in our adherence to *Save More*.

V.

We find that the applicable standard of review of administrative sanctions stems from the language of the Supreme Court in *Butz* v. *Glover Livestock Commission Co.,* 411 U.S. 182 (1973). There a stockyard operator, after an administrative hearing, was found by a designated Judicial Officer of the Secretary of Agriculture to be in violation of the Packers and Stockyards Act, 1921, 7 U.S.C. § 181 *et seq.* The respondent was ordered to cease and desist from the violations and to keep proper records, and its registration under the Act was suspended for 20 days. Upon review of the decision and order, the court of appeals upheld, as supported by substantial evidence, the findings that respondent had violated the Act by short-weighting cattle and sustained the cease and desist order and the order to keep correct accounts. However, the court of appeals set aside the 20 day suspension. *Glover Livestock Commission Co.* v. *Hardin,* 8 Cir., 454 F.2d 109, 115 (1972). The Supreme Court reversed, holding that the lower court exceeded the scope of proper judicial review of administrative sanctions in setting aside the suspension and that its action constituted an impermissible intrusion into the administrative domain under the circumstances. 411 U.S. at 183, 188. The Court stated:

> The applicable standard of judicial review in such cases required review of the Secretary's order according to the "fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" *American Power Co.* v. *SEC,* 329 U.S. 90, 112 (1946). Thus, the Secretary's choice of sanction was not to be overturned unless the Court of Appeals might find it "unwarranted in law or . . . without justification in fact. . . ." *Id.,* at 112-113.

411 U.S. at 185-6.

Finding nothing in the record to justify the action of the reviewing court in overturning the suspension authorized by the statute, the Court held that the court below clearly exceeded its function of judicial review. The Court concluded: "The fashioning of an appropriate and reasonable remedy is for the Secretary, not the court. The court may decide only whether, under the pertinent statute and relevant facts, the Secretary made 'an allowable judgment in [his] choice of the remedy.' *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608, 612 (1946)." *Id.* at 188-9.

In *Butz,* the Court twice cited with apparent approval our *G. H. Miller & Co.* v. *United States, supra.* 411 U.S. at 187. In *G. H. Miller & Co.,* on rehearing en banc, we held:

> It is, therefore, clear to us that if the order of an administrative agency finding a violation of a statutory provision is valid and the penalty fixed for the violation is within the limits of the statute the agency has made *an allowable judgment in its choice of the remedy* and ordinarily the Court of Appeals has no right to change the penalty because the agency might have imposed a different penalty. (Emphasis in original.)

260 F.2d at 296. We further found the remedy selected had a reasonable relationship to the practice found to exist. *Id.* at 296-7.

In Judge Russell's dissent in *Cross*, 512 F.2d at 1224-5, he quoted with approval the *Butz* standard, as well as its approval of our *G. H. Miller & Co.* holding.

In sum, therefore, we adhere to what we said in *Save More*, and if that is not specific enough, it is now made clear by our incorporation of the *Butz* standard of review. Having found that the Secretary here made an allowable judgment in his choice of remedy, that the sanction imposed bears a reasonable relationship to the goal the legislation was intended to accomplish, and that the sanction was within the limits of the applicable statute and was valid, we feel compelled to reverse that part of the judgment of the district court which reduced the sanction from one year to 120 days as an impermissible intrusion into the administrative domain under the circumstances present here.

In light of the foregoing, the judgment of the district court reducing the sanction against plaintiff Nowicki from one year to 120 days is reversed. In all other respects, the judgment is affirmed.

AFFIRMED IN PART.
REVERSED IN PART.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 4159—The Scheffer Press, Inc., Chicago, Illinois—6-22-76—250

APPENDIX D

DENIAL OF PETITION FOR REHEARING BY

UNITED STATES COURT OF APPEALS

Opinion by Judge Hastings

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 22, 1976

Before
Hon. John S. Hastings, Senior Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. Charles Edward Wyzanski, Jr., Senior District Judge *

KEITH NOWICKI d/b/a K & F FOOD MARKET, Plaintiff-Appellee,	)	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division
No. 75-1685 vs.	)	
UNITED STATES OF AMERICA, Defendant-Appellant.	)	No. SB 71-C-83 ROBERT A. GRANT, Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby,

AFFIRMED IN PART and REVERSED IN PART, in accordance with the opinion of this court filed this date; with costs assessed against plaintiff-appellee Nowicki.

---

* Honorable Charles Edward Wyzanski, Jr., Senior United States District Judge for the District of Massachusetts, sitting by designation.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 5, 1976

Before
Hon. John S. Hastings, Sr. Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. Charles Edward Wyzanski, Jr., Sr. District Judge *

KEITH NOWICKI d/b/a K & F FOOD MARKET, Plaintiff-Appellee,	) Appeal from the) United States) District Court) for the Northern
No. 75-1685 vs.	) District of Indiana,) South Bend Division
UNITED STATES OF AMERICA, Defendant-Appellant.	) (SB 71 C 83)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be, and the same is hereby, DENIED.

---

* The Honorable Charles Edward Wyzanski, Jr., Senior United States District Judge for the District of Massachusetts, is sitting by designation.

APPENDIX E

FOOD STAMP ACT

"Any approved retail food store or wholesale food concern may be disqualified from further participation in the food stamp program on a finding, made as specified in the regulations, that such store or concern has violated any of the provisions of this chapter, or of the regulations issued pursuant to this chapter. Such disqualification shall be for a period of time as may be determined in accordance with regulations issued pursuant to this chapter. The action of disqualification shall be subject to review as provided in section 2022 of this title." 78 Stat. 707 (1964) 7 U.S.C.A. §2020.

"Whenever/ ...(b) a retail food store or a wholesale food concern is disqualified under the provisions of section 2020 of this Title, ... notice of such administrative action shall be issued to the retail food store or wholesale food concern involved. Such notice shall be delivered by certified mail or personal service. If such store or concern is aggrieved by such action, it may, in accordance with regulations promulgated under this chapter, within ten days of the date of delivery of such notice, file a written request for an opportunity to submit information in support of its position to such person or persons as the regulations may designate. If such a request is not made or if such store or concern fails to submit information in support of its position after filing a request, the administrative determination shall be final. If such a request is made by such store or concern, such information as may be submitted by the store or concern, as well as such other information as may be available, shall be reviewed by the person or persons designated, who shall, subject to the right of judicial review hereinafter provided, make a determination which shall be final and which shall take effect fifteen days after the date of delivery of such final notice of determination. If the store or concern feels aggrieved by such final determination, he may obtain judicial review thereof by filing a complaint against the United States in the United States District Court for the district in which he resides or is engaged in business, or in any court of record of the state having competent jurisdiction, within thirty days after the date of delivery or service of the final notice of determination upon him, requesting the court to set aside such determination. ... The suit in the United States district court or State court shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action at issue. If the court determines that such administrative action is invalid, it shall enter such judgment or order as it determines is in accordance with the law and the evidence. During the pendency of such judicial review, or any appeal therefrom, the administrative action under review shall be and remain in full force and effect, unless an application to the court on not less than ten days' notice, and after hearing thereon and a showing of irreparable injury, the court temporarily stays such administrative action pending disposition of such trial or appeal."
78 Stat. 707 (1964) 7 U.S.C.A. §2022.

APPENDIX E

PERTINENT REGULATIONS OF THE

FOOD STAMP PROGRAM WHICH ARE

NOW IN EFFECT

UNITED STATES DEPARTMENT OF AGRICULTURE
FOOD AND NUTRITION SERVICE

FOOD STAMP PROGRAM

Regulations Pertinent to Retailers and Wholesalers

Title 7 - AGRICULTURE

Chapter 11 - Food and Nutrition Service, Department of Agriculture

SUBCHAPTER C - FOOD STAMP PROGRAM

(s) "Eligible food" means any food or food product for human consumption except alcoholic beverages and tobacco and also includes seeds and plants for use in gardens to produce food for the personal consumption of the eligible household. It shall also mean meals prepared and delivered by an authorized nonprofit meal delivery service or served by a communal dining facility for the elderly to elderly persons and their spouses and to households eligible under §271.3(a)(2) or (a)(3) of this subchapter; and meals prepared and served by an authorized drug addition and alcoholic treatment and rehabilitation program to households eligible under §271.3(a)(4).

§ 272.2 Participation of retail food stores, and meal services.

(b) Coupons shall be accepted by an authorized retail food store or meal service only in exchange for eligible food as defined in §270.2(s) of this subchapter, except that authorized food stores in Alaska may accept food coupons for hunting and fishing equipment from eligible households participating in accordance with §271.3(a)(5). An authorized food retailer or meal service shall not accept coupons in payment for deposit on bottles or other returnable food containers.

(c) Coupons shall be accepted for eligible foods at the same prices and on the same terms and conditions applicable to cash purchases of the same foods at the same store: Provided, That nothing in this part shall be construed as authorizing FNS to specify the prices at which food may be sold by retail food stores or meal services.

§ 272.6 Disqualification of retail food stores, meal services, and wholesale food concerns.

(a) Any authorized retail food store, authorized meal service, or authorized wholesale food concern may be disqualified from further participation in the program by FNS for a reasonable period of time, not to exceed 3 years, as FNS may determine, if such firm fails to comply with the Food Stamp Act or the provisions of this part; except that, if the disqualification is based on failure of such firm to pay a monetary claim determined by FNS pursuant to § 272.7, such disqualification may be continued until such claim is paid. Any firm which has been so disqualified and which desires to be reinstated upon the end of the period of dis-

qualification or at any time thereafter shall file a new application so that FNS may determine whether reinstatement is appropriate under the provisions of this part. Such an application may be filed starting 10 days before the end of the period of disqualification.

(b) Any firm considered for disqualification under paragraph (a) of this section shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before a final determination is made by FNS as to the administrative action to be taken. Prior to such determination, the firm shall be sent a letter of charges by the appropriate Regional Office, FNS. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification. Such letter shall inform the firm that it may respond either orally or in writing to the charges contained therein within 10 days of the mailing date thereof, which response shall set forth a statement of evidence, information, or explanation pertaining to the specified violations or acts. Such response, if any, shall be made to the Officer-In-Charge, FNS Field Office, who has responsibility for the project area in which the firm is located.

(c) The letter of charges, the response, and such other information as may be available to FNS shall be reviewed and considered by the Chief, Retailer-Wholesaler Branch, Food Stamp Division, who shall then issue his determination.

(d) The determination of the Chief, Retailer-Wholesaler Branch, Food Stamp Division, shall be final and not subject to further administrative or judicial review unless

a written request for review is filed within 10 days in accordance with § 272.8.

(e) The mailing by certified mail or delivery by personal service of any notice required of FNS by this part will constitute notice to the addressee of its contents.

PART 273 - ADMINISTRATIVE AND JUDICIAL REVIEW - FOOD RETAILERS, FOOD WHOLESALERS AND MEAL SERVICES

Subpart A - Administrative Review - General

273.1 Scope and purpose
273.2 Food Stamp Review Officer
273.3 Authority and jurisdiction
273.4 Rules of Procedure

Subpart B - Rules of Procedure

273.5 Manner of filing requests for review
273.6 Content of requests for review
273.7 Action upon receipt of a request for review
273.8 Determination of the Food Stamp Review Officer
273.9 Legal advice and extensions of time

Subpart C - Judicial Review

273.10 Judicial review

Authority: The provisions of this Part 273 issued under 78 Stat. 703, as amended, 7 U.S.C. 2011-2026.

Subpart A - Administrative Review - General

§ 273.1 Scope and purpose.

This Subpart A sets forth the procedure for the designation of Food Stamp Review

Officers and the authority and jurisdiction of such officers, Subpart B of this part sets forth the rules of procedure to be followed in the filing and disposition of the requests for review for which provision is made in § 272.8. Subpart C of this part relates to the provisions governing the rights of food retailers, food wholesalers, and meal services to judicial review of the final determinations of the Food Stamp Review Officer.

§ 273.2 Food Stamp Review Officer.

(a) The Administrator, FNS, shall designate one or more persons to act as Food Stamp Review Officers.

(b) Such officers shall serve for such periods as the Administrator, FNS, shall determine. Changes in designations and additional designations, may be made from time to time at the discretion of the Administrator, FNS. When more than one Food Stamp Review Officer has been designated, requests for review will be assigned for handling to individual Food Stamp Review Officers by a person designated by the Administrator, FNS. The names of the Food Stamp Review Officers shall be on file in the Office of the Administrator, FNS.

§ 273.3 Authority and Jurisdiction.

(a) A Food Stamp Review Officer shall act for the Department on requests for review filed by firms aggrieved by any of the following actions:

(1) Denial of an application to participate in the program under § 272.1 of this subchapter; or

(2) Disqualification from participation in the program under § 272.6 of this subchapter; or

(3) Denial of all or any part of any claim under § 272.7 of this subchapter.

(b) The determination of the Food Stamp Review Officer on such a review shall be the final administrative determination of the Department, subject, however, to judicial review as provided in section 13 of the Food Stamp Act and Subpart C of this part.

§ 273.4 Rules of procedure.

Rules of procedure for the orderly filing and disposition of requests for review of firms submitted in accordance with § 273.5 are issued in Subpart B of this part. The administrator, FNS, may subsequently issue amendments to such rules of procedure as he deems appropriate.

Subpart B - Rules of Procedure

§ 273.5 Manner of filing requests for review.

(a) Requests for review submitted by firms shall be mailed to or filed with "Food Stamp Review Officer, FNS, U.S. Department of Agriculture, Washington, D.C. 20250."

(b) Such requests shall be in writing and shall state the name and business address of the firm involved, and the name, address, and position with the firm of the person who signed the request. The request shall be signed by the owner of the firm, an officer or partner of the firm, or by counsel, and need not be under oath.

(c) Such a request shall be filed with the Food Stamp Review Officer within 10 calendar days of the date of delivery of the notice of the action for which review is requested. For the purpose of determining whether such a request was timely filed, the filing date shall be deemed to be the postmark date of the request, or equivalent if the written request is filed by a means other than mail.

§ 273.6 Content of requests for review.

(a) Requests for review shall clearly identify the administrative action from which the review is requested. Such identification shall include the date of the letter or other written communication notifying the firm of the administrative action, the name and title of the person who signed such letter or other communication, and whether the action under appeal concerns a denial of an application for participation, a disqualification from further participation, or a denial of all or any part of a claim.

(b) Such requests shall include information on support of the request showing the grounds on which the review is being sought from the administrative action, or it shall state that such information will be filed in writing at a later date. In such event, the Food Stamp Review Officer shall notify the firm of the date by which such information must be filed. The firm requesting review may ask for an opportunity to appear before the Food Stamp Review Officer in person: Provided, That any information so submitted in person shall, if directed by the Food Stamp Review Officer, be reduced to writing by the firm andsubsequently filed with the Food Stamp Review Officer within such period as he shall specify.

§ 273.7 Action upon receipt of a request for review.

(a) Upon receipt of a request for review of a disqualification action, the Food Stamp Review Officer shall notify the Chief of the Retailer-Wholesaler Branch, Food Stamp Division, FNS, in writing, of the action under review and shall direct that the administrative action shall be held in abeyance until the Review Officer has made his determination. Upon receipt of a request for review of a denial of application to participate in the program, or of a denial of a claim, the Food Stamp Review Officer shall notify the Chief of the Retailer-Wholesaler Branch, Food Stamp Division, FNS, in writing of the action under review and shall direct that the firm shall not be approved for participation or paid any part of the disputed claim until the Review Officer has made his determination. In any case, notice to the Chief, Retailer-Wholesaler Branch shall be accompanied by a copy of the request filed by the firm.

(b) If the request filed by the firm includes a request for an opportunity to file written information in support of its position at a later date, the Food Stamp Review Officer shall promptly notify the firm of the date by which such information shall be filed. If the firm fails to file any information in support of its position by the designated date, the information submitted with the original request shall be deemed to be the only information submitted by the firm. In such event, if no information in support of the firm's position was submitted with the original request, the action of the appropriate FNS Regional Office, or of the Chief, Retailer-Wholesaler Branch, Food

Stamp Division, FNS, whichever is applicable shall be final.

(c) If the firm filing the request for review asked for an opportunity to appear before the Food Stamp Review Officer in person, such Officer shall promptly notify the firm of the date, time and place set for such appearance. If such firm fails to appear before the Food Stamp Review Officer as specified, any written information timely submitted in accordance with this section shall be deemed to be the only information submitted by such firm.

(d) The Food Stamp Review Officer shall require the Chief, Retailer-Wholesaler Branch, Food Stamp Division, FNS, to promptly submit, in writing, all information which was the basis for the administrative action for which the review has been requested.

§ 273.8 Determination of the Food Stamp Review Officer.

(a) The Food Stamp Review Officer shall make a determination based upon:

(1) The information submitted by the Chief, Retailer-Wholesaler Branch, Food Stamp Division, FNS;

(2) Information submitted by the firm in support of its position; and

(3) Such additonal information, in writing, as may be obtained by such Officer from any other person having relevant information.

(b) In the case of a request for review of a denial of an application to participate in the program, the determination of the Food Stamp Review Officer shall sustain the action under review or shall direct that the firm be approved for participation.

(c) In the case of a request for review of action disqualifying a firm from participation in the program, the determination of the Food Stamp Review Officer shall sustain the action under review or specify a shorter period of disqualification, direct that an official warning letter be issued to the firm in lieu of any period of disqualification, or direct that no administrative action be taken in the case.

(d) In the case of a request for review of a denial of all or any part of a claim of a firm, the determination of the Food Stamp Review Officer shall sustain the action under review or shall specify the amount of the claim to be paid by FNS.

(e) The Food Stamp Review Officer shall notify the firm of his determination by certified mail. Such notification shall be sent to the representative of the firm who filed the request for review.

(f) The Food Stamp Review Officer shall send a copy of his notification to the firm to the Chief, Retailer-Wholesaler Branch, Food Stamp Division, FNS, who shall undertake such action as may be necessary to comply with the determination of such officer.

(g) The determination of the Food Stamp Review Officer shall take effect 15 days after the date of delivery of such determination to the firm.

§ 273.9 Legal Advice and extensions of time.

(a) If any request for review involves any doubtful questions of law, the Food Stamp Review Officer shall obtain the advice of the Office of the General Counsel, U.S. Department of Agriculture.

(b) Upon timely written request to the Food Stamp Review Officer by the firm requesting the review, the Food Stamp Review Officer may grant extensions of time, if, in his discretion, additional time is required for the firm to fully present information in support of its position: Provided, That no extensions shall be made in the time allowed for the filing of a request for review.

Subpart C - Judicial Review

§ 273.10 Judicial review.

(a) A firm aggrieved by the determination of the Food Stamp Review Officer, may obtain judicial review of such determinations, by filing a complaint against the United States in the U.S. District Court for the district in which he resides or is engaged in business, or in any court of record of the State having competent jurisdiction. Such complaint must be filed within 30 days after the date of delivery or service upon him of the notice of determination of the Food Stamp Review Officer in accordance with § 273.8(e) otherwise such determination shall be final.

(b) Service of the summons and complaint in any such action shall be made in accordance with the Rules of Civil Procedure for the U.S. District Courts. The copy of

the summons and complaint required by such Rules to be served on the officer or agency whose order is being attacked shall be sent by registered or certified mail to the person in charge of the applicable Regional Office of FNS listed in § 270.5 of this subchapter.

(c) The suit in the U.S. District Court or in the State court, as the case may be, shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue. If the court determines that such administrative action is invalid it shall enter such judgment or order as it determines is in accordance with the law and the evidence.

(d) During the pendency of such judicial review, or any appeal therefrom, the administrative action under review shall remain in full force and effect, unless the firm makes application to the court upon not less than 10 days' notice, and, after hearing thereon and a showing of irreparable injury, the court temporarily stays the administrative action under review pending disposition of the de novo trial or an appeal therefrom.

7 C.F.R. 272-274, 35 F.R. 19737 (1975)

APPENDIX F

PERTINENT REGULATIONS OF THE FOOD STAMP PROGRAM WHICH WERE IN EFFECT IN 1971 AND WHICH WERE REPLACED BY THE REGULATIONS SET FORTH IN APPENDIX E

7 C.F.R. 1602.2(b) (1970) provided:

(b) Coupons shall be accepted by an authorized retail food store only in exchange for eligible foods, as defined in § 1600.2(i) of this chapter. A food retailer shall not knowingly accept coupons for any imported meat or meat products. The acceptance of coupons for meat or meat products which are labeled or can be identified as imported when they are delivered to the retail food store or to a central warehouse, a distribution center or meat fabricating facility, operated by the food retailer shall be deemed to have been done with knowledge of the fact that such meat or meat products were imported. Any other food product which is clearly identified on the package as being imported shall not be exchanged for coupons. Coupons shall be accepted for eligible foods at the same prices and on the same terms and conditions applicable to cash purchases of the same foods at the same store: Provided, however, That nothing in this part shall be construed as authorizing C&MS to specify the prices at which food may be sold by retail food stores.

7 C.F.R. 1600.2(i) (1970) provided:

(i) "Eligible food" means any food or food product for human consumption except alcoholic beverages, tobacco, those foods which are identified on the package as being imported, and meat and meat products which are imported.

7 C.F.R. 272.6(b), (c) (1971) provided:

(b) Any retail food store or wholesale food concern considered for disqualification under paragraph (a) of this section shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of non-compliance before a final determination is made by FNS as to the administrative action to be taken. Prior to such determination, the retail food store or wholesale food concern shall be sent a letter of charges by the appropriate Regional Office, Food and Nutrition Service. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification. Such letter shall inform the retailer or food wholesaler that he may respond either orally or in writing to the charges contained therein within 10 days of the mailing date thereof, which response shall set forth a statement of evidence, information, or explanation pertaining to the specified violations or acts. Such response, if any, shall be made to the Officer-In-Charge, Food and Nutrition Service Field Office, who has responsibility for the county in which the retail food store or wholesale food concern is located.

(c) The letter of charges, the response, and such other information as may be available to FNS shall be reviewed and considered

by the Director, Food Stamp Division, who shall then issue his determination.

7 C.F.R. 1602.6(a) (1970) provided:

(a) Any authorized retail food store or authorized wholesale food concern may be disqualified from further participation in the Program by C&MS for a reasonable, definitely stated period of time, not to exceed three years, as C&MS may determine, if such retail food store or wholesale food concern fails to comply with the Food Stamp Act of 1964 or the provisions of this part.

APPENDIX G

RULE 19(1)(b) OF THE

RULES OF THE SUPREME COURT

OF THE UNITED STATES

"Rule 19. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: ...

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; ... or has decided an important question of federal law which has not been, but should be, settled by this court;"

Supreme Court, U. S.
FILED
FEB 3 1977
MICHAEL RODAK, JR., CLERK

No. 76-621

In the Supreme Court of the United States

OCTOBER TERM, 1976

KEITH NOWICKI, d/b/a K & F FOOD MARKET, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-621

KEITH NOWICKI, d/b/a K & F FOOD MARKET, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C) is reported at 536 F. 2d 1171. The opinions of the district court (Pet. App. B) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1976. A petition for rehearing was denied on August 5, 1976 (Pet. App. D). The petition for a writ of certiorari was filed on November 2, 1976. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals applied the proper standard in reviewing the period of disqualification imposed by the Secretary of Agriculture upon a food retailer for violations of the Food Stamp Act of 1964, 78 Stat. 703, as amended, 7 U.S.C. 2011 *et seq.*

STATUTORY PROVISIONS INVOLVED

The statutory provisions and regulations involved are set forth in the appendix to the petition (Pet. Apps. E and F).

STATEMENT

Petitioner's retail food store was disqualified from participation in the food stamp program by the Secretary of Agriculture for violations of the Food Stamp Act of 1964.[1] Pursuant to the procedures specified in 7 U.S.C. 2022 and 7 C.F.R. Parts 272 and 273, the Regional Office of the Department of Agriculture informed petitioner in January 1971 that there was reason to believe that petitioner had violated the food stamp regulations and that he could reply, either orally or in writing, submitting information, explanations, or evidence concerning the incidents. Petitioner appeared in person and denied the violations (Pet. App. 9-10). Thereafter, petitioner was sent a notice of disqualification, stating that petitioner was disqualified for one year as a result of the violations charged (Pet. App. 1-3).[2]

Petitioner submitted a written request for review, and argument in support of his position. A food stamp review

---

[1]Petitioner was charged with exchanging nonfood items for food stamps in violation of 7 U.S.C. 2013(a) and 7 C.F.R. 1600.2(i) and 1602.2(b) (1971), now 7 C.F.R. 270.2(s) and 272.2(b), and giving incorrect change in violation of 7 C.F.R. 1602.2(b) (1971).

[2]7 U.S.C. 2020 authorizes disqualification of participating food stores for violations "for such period of time as may be determined in accordance with regulations issued pursuant to this [Act]."

Regulations provide for disqualification "for a reasonable period of time, not to exceed three years." 7 C.F.R. 272.6(a).

The Department of Agriculture (Food and Nutrition Service) has issued further administrative guidelines setting forth criteria for determining particular periods of disqualification within the three-year range specified in the regulations. See FNS (FS) Instruction 744-9 (March 13, 1970), a copy of which has been lodged with the Court.

officer of the Food and Nutrition Service concluded, in a letter dated April 27, 1971, that the violations did occur, that there were no extenuating circumstances, that the violations were committed with full knowledge of, and complete disregard for, the food stamp program regulations, and that the violations were serious in nature. The officer sustained the determination of violation and the one-year disqualification period (Pet. App. 4-7).

Petitioner thereafter filed an action in the United States District Court for the Northern District of Indiana pursuant to 7 U.S.C. 2022, challenging the disqualification of his store. That statute authorizes "a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue." The district court found that the evidence presented to it established that petitioner had violated the regulations, since petitioner's store clerk admitted that she sold noneligible items for food stamps (Pet. App. 14-15). The district court also found that the penalty was within the limits prescribed by regulation and therefore valid; the court observed that since the penalty was within the prescribed limits, the length of the disqualification was not before the court, citing *Martin* v. *United States*, 459 F. 2d 300 (C.A. 6), certiorari denied, 409 U.S. 878 (Pet. App. 15).

On the basis of the subsequent decision of *Cross* v. *United States*, 512 F. 2d 1212 (C.A. 4), the district court *sua sponte* suspended its judgment and thereafter conducted a hearing at which it accepted evidence on the question of the period of disqualification. The court determined that the period of disqualification imposed, although within the limits of the regulations, was "too harsh a sanction" and modified its prior order by reducing the disqualification period from one year to 120 days (Pet. App. 16-17).

Upon appeal by the government, the court of appeals reversed the district court's judgment reducing the period

of disqualification. The court of appeals found the district court's judgment shortening the period of disqualification was an "impermissible intrusion into the administrative domain under the circumstances present here" (Pet. App. 30).

ARGUMENT

1. Petitioner incorrectly contends that this case presents a conflict with the decisions of other courts of appeals in "identical cases" (Pet. 7). It is true that the four courts of appeals[3] that have considered judicial review of periods of retailer disqualification from participation in the food stamp program have reached conflicting conclusions concerning several aspects of review. But the conflicts that may exist are not squarely presented in this case.

a. The court of appeals held that in reviewing the period of disqualification the district court should have applied the standard of review set forth in *Butz* v. *Glover Livestock Commission Co.*, 411 U.S. 182, which held that the Secretary's choice of sanction for violation of the Packers and Stockyards Act "was not to be overturned unless the Court of Appeals might find it 'unwarranted in law or . . . without justification in fact . . .' " (411 U.S. at 185-186), and that a "court may decide only whether, under the pertinent statute and relevant facts, the Secretary made 'an allowable judgment in [his] choice of the remedy' " (*id.* at 189). The court of appeals concluded that "[h]aving found that the Secretary here made an allowable judgment in his choice of remedy, that the sanction imposed bears a reasonable relationship to the goal the legislation was intended to accomplish, and that the sanction was within the limits of the applicable statute and was valid" (Pet. App. 30), it was compelled to reverse the district court and to permit the

[3]See *Martin* v. *United States*, *supra*, *Cross* v. *United States*, *supra*, and *Goodman* v. *United States*, 518 F. 2d 505 (C.A. 5).

administratively determined period of disqualification to stand.

Contrary to petitioner's assertion (Pet. 8-10), the standards of review adopted by the Fourth Circuit in *Cross* v. *United States*, *supra*, and the Fifth Circuit in *Goodman* v. *United States*, *supra*, do not differ markedly from that enunciated by the court of appeals below. In *Cross*, the Fourth Circuit also relied upon *Butz* v. *Glover Livestock Commission Co.*, *supra*, stating that the Secretary's choice of sanction is not to be overturned unless it is " 'unwarranted in law or . . . without justification in fact' " and concluding that this standard is the same as the Administrative Procedure Act standard that requires a court to determine whether agency action was "arbitrary or capricious." The Fourth Circuit concluded that the Secretary's action could be overturned only where "it may be fairly said * * * that the Secretary has abused his discretion by acting arbitrarily or capriciously." 512 F. 2d at 1218.

The Fifth Circuit in *Goodman* approved the Fourth Circuit's statement of the standard to which trial courts must adhere when reviewing the propriety of a sanction, and quoted from that opinion: "To be 'valid', a sanction must not be arbitrary and capricious, and a sanction is arbitrary and capricious if it is unwarranted in law or without justification in fact" (518 F. 2d at 511).

While the Seventh Circuit has stated the standard somewhat differently from the Fourth and Fifth Circuits, all explicitly rely on *Glover Livestock*. It is not clear whether their different statements of the standard reflect the adoption of standards that are substantively different in fact. Apparently no court of appeals has yet disapproved a sanction imposed by the Secretary for a violation of the Food Stamp Act, and therefore it cannot be said that the courts of appeals would reach different results on the same

facts.[4] Accordingly, at present there is no reason to conclude that the circuits have enunciated inconsistent standards or that there is a conflict between the circuits on this issue.

b. There does appear to be conflict between the circuits concerning the proper disposition of a case if the court disapproves the period of disqualification.[5] This case does not present this issue for resolution, however, since the court of appeals upheld the period of disqualification imposed by the Secretary.

c. The only other significant issue concerning judicial review on which several of the circuits appear to disagree at this time concerns the authority of the district court to hear new evidence concerning the appropriateness of the period of disqualification. The Fourth and Fifth Circuits in *Cross* and *Goodman* remanded to the district court to hear new evidence on the issue of the period of disqualification. The Sixth Circuit in *Martin* construed the trial *de novo* provisions of 7 U.S.C. 2022 to apply only to the fact of violation and presumably would not find the trial court

---

[4]The Sixth Circuit in *Martin* v. *United States*, *supra*, stated that the statute authorizes a review only on the merits of the case, and not on the period of disqualification (459 F. 2d at 301). But insofar as the position taken by the Seventh Circuit here is more favorable to petitioner than the position apparently taken by the Sixth Circuit, petitioner cannot be heard to complain of any conflict between those two courts.

[5]In *Cross*, the Fourth Circuit stated that a district court may, if it finds that the Secretary acted arbitrarily or capriciously, modify the penalty, but that in doing so the court would be required to follow the guidelines set by the Secretary. In *Goodman*, the Fifth Circuit stated that in such circumstances the district court may prescribe such period of qualification as is in accord with the law and the evidence. In contrast, the Sixth and Seventh Circuits, in *Martin* and this case, respectively, apparently take the view that disapproval of a sanction would require a remand to the Secretary. But no circuit has adopted the position espoused by petitioner (Pet. 11) that a district court itself may revise sanctions in the absence of a finding that the period of disqualification was arbitrary or capricious or otherwise in excess of authority.

authorized to take new evidence relating to the period of disqualification. The court of appeals in the present case does not appear explicitly to have addressed this issue. The district court had provided petitioner an opportunity to present new evidence, but that court did not state whether its decision was affected by any new evidence presented to it. The court of appeals did not discuss the district court's action in taking new evidence, and it did not indicate in its opinion the record on which it determined the agency action to be valid. Since the court of appeals did not clearly state its position on the question, this is not an appropriate case for resolution of any disagreement between the circuits on this issue.

2. The court of appeals correctly sustained the period of disqualification in this case. The district court had improperly substituted its judgment as to the appropriate period of disqualification, and the court of appeals correctly reversed.

The sanction imposed by the Secretary for petitioner's serious violations plainly bore a reasonable relationship to the goals of the legislation and was within the period allowed by statute and regulations. Discretionary determinations satisfying these criteria are not arbitrary or capricious and must be sustained. As the Court stated in *Glover Livestock*, " 'the relation of remedy to policy is peculiarly a matter for administrative competence.' *American Power Co.* v. *S.E.C.*, 329 U.S. 90, 112 (1946)." 411 U.S. at 185.

Petitioner nevertheless contends (Pet. 11) that the statute here, unlike that involved in *Glover Livestock*, contemplates that the district court will substitute its own judgment as to the proper period of disqualification for that of the Secretary. But the relevant statute, 7 U.S.C. 2022, restricts the district court to a review of the "validity" of the period of disqualification. Discretionary deter-

minations by the Secretary that bear a reasonable relationship to the goal of the legislation and are within the period allowed by statute and regulation are, we submit, "valid" under that statute. The further inquiry by the district court that petitioner urges would concern not the validity or invalidity of the agency action but the wisdom or appropriateness, in the district court's view, of the particular choice of sanction. By limiting review to the question of validity, Congress clearly intended that the administrator would not be subject to judicial second-guessing with respect to such judgmental considerations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

FEBRUARY 1977.